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NO. 93-735

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

N. WALTER GOINS,

Petitioner,

v.

DALE W. LANG, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the district court abused its discretion in denying Petitioner's motion for default judgment for failure to file a timely defense in the district court, when a timely defense was filed in the bankruptcy court where the case was then pending after transfer by removal or automatic reference.

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BRIEF IN OPPOSITION

Respondents Syndicated Communications, Inc.

("Syndicated Communications"), its subsidiary Syncom

Capital Corp. ("Syncom"), and Broadcast Capital, Inc. ("Broadcap")[1/] hereby file this response to a Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") entered on June 25, 1993, in No. 92-3717MN affirming the judgment of the United States District Court for the District of Minnesota ("District Court") granting summary judgment against Petitioner N. Walter Goins ("Goins").

1/ Pursuant to Rule 29, Sup. Ct. Rules, the following information is provided: Syndicated Communications, Inc. has no parent corporation, and has three wholly-owned subsidiary corporations, i.e., Syncom Capital Corporation, K Street Venture Associates, Inc., and National Beeper, Inc. The parent of Broadcast Capital, Inc. is Broadcast Capital Fund, Inc., and it has a single, wholly-owned subsidiary corporation, Broadcap of Florida, Inc.

I.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

This case does not involve any constitutional provisions. The statutory provisions and rules involved are included among those presented in the Petition.

II.

COUNTERSTATEMENT OF THE CASE

A. The Complaint.

On or about February 18, 1992, Goins filed a complaint in the District Court against various parties, including respondents Syndicated Communications, its subsidiary Syncom, and Broadcap (hereinafter collectively "Banking Respondents"), which he thereafter served by mail. While the nature of Goins' claims against the Banking Respondents is unclear, his complaint

mentions them in four counts alleging, respectively, violations of antitrust laws (Count I), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. (Count II), and the Civil Rights Act, 42 U.S.C. §§ 1983, 1985 (Counts V and VII).

Goins filed and served by mail a minor amendment to his complaint on or about February 23, 1992. On March 17, 1992, the Banking Respondents acknowledged receipt of the amended complaint. Their answer was therefore due on April 6, 1992.

B. The Removal To Bankruptcy Court.

On March 20, prior to the date the Banking Respondents' answer was due, three of the defendants (KTMA Acquisition Corp., Donald R. Johnston, and Larry B. Ricke) filed a Notice of

Removal under Fed. R. Bank. P. 9027, removing the entire case to the United States Bankruptcy Court for the District of Minnesota ("Bankruptcy Court"). The grounds for removal were that KTMA Acquisition Corp. was the debtor in a Chapter 11 proceeding then pending in the Bankruptcy Court, Johnson was the trustee of the debtor, and Ricke was counsel to the trustee. The Notice of Removal noted that Goins had appeared in that Chapter 11 proceeding and had filed six pleadings therein. The Notice of Removal also alleged that the case was referable to the Bankruptcy Court pursuant to Local Bankruptcy Rule 201 and 28 U.S.C. § 157(a).

C. The Motion To Dismiss.

On April 6, 1992, the Banking Respondents filed in Bankruptcy Court, where the action was then pending, a motion to dismiss pursuant to Fed. R.

Bank. P. 7012(b) for failure to state a claim and for lack of personal jurisdiction and noticed a hearing on that motion for May 1, 1992.[2/]

On April 9, 1992, Goins filed in District Court a motion to strike all pleadings referring to or bearing the caption of the bankruptcy matter. On April 14, 1992, the United States Magistrate assigned to the case denied the motion to strike, reciting that the case had been removed to Bankruptcy Court. Petitioner's Appendix ("P.A.") II. On May 6, 1992, that ruling was affirmed by the District Court on the ground that the case properly was before the Bankruptcy Court "pursuant to either the automatic reference provisions of Local Rule 201 . . . or the

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2/ The motion noted that if affidavits submitted with the motion were considered, the motion should be treated as one for summary judgment under Fed. R. Civ. P. 56.

filing of defendants' notice of removal under Bankr. R. 9027 . . . ." P.A. IV, at 3-4.

On April 21, 1992, Goins filed in Bankruptcy Court a "Notice of Jurisdictional Objection," arguing that the Bankruptcy Court lacked jurisdiction over the action and, consequently, over the Banking Respondents' motion to dismiss, for a variety of reasons. On May 4, 1992, the Bankruptcy Court issued an order ruling that it did not have jurisdiction over Goins' claims against the Banking Respondents and, on that basis, denied the Banking Respondents' motion to dismiss. P.A. III, at 2-3. Upon receiving the Bankruptcy Court's order, the Banking Respondents immediately refiled their motion to dismiss in the District Court on May 5, 1992.

D. The Application For A Default Judgment.

On May 10, 1992, Goins filed an Application For A Default Judgment in the District Court, on the ground that the Banking Respondents originally filed their motion to dismiss in Bankruptcy Court, rather than in the District Court. On May 26, 1992, the District Court denied Goins' motion for default judgment on the ground that the case was properly before the Bankruptcy Court pursuant to automatic reference or removal.[3/] P.A. VI, at 2-3.

3/ On June 12, 1992, Goins appealed the District Court's interlocutory order denying his motion for a default judgment to the Eighth Circuit. On July 8, 1992, the Banking Respondents moved to dismiss the appeal for lack of jurisdiction because the denial of Goins' motion for a default judgment was not an appealable order. On July 17, 1992, the Eighth Circuit granted the Banking Respondents' motion, and on September 1, 1992, the Eighth Circuit denied Goins' petition for rehearing. On November 30, 1992, Goins petitioned this Court for a writ of certiorari to review the Eighth Circuit's dismissal of the appeal of the District Court's interlocutory order

(continued...)

E. Remand, Final Judgment And The Eighth Circuit Appeal.

On May 29, 1992, the Bankruptcy Court ordered the case remanded to the District Court.[4/] That order was filed and entered on the Bankruptcy Court docket on June 1 and transmitted to the District Court on June 9, 1992. See P.A. VII. On October 10, 1992, the District Court entered an order treating the Banking Respondents' motion to dismiss as one for summary judgment and granted that motion. P.A. X. Judgment was entered on October 13, 1992. On November 12, 1992, Goins noticed an appeal to the Eighth Circuit. On June 25, 1993, the Eighth Circuit affirmed the judgment of the District Court in a per

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3/ (...continued)
denying his application for default judgment. This Court denied the petition on January 19, 1993.

4/ On May 14, 1992, the Bankruptcy Court had enlarged time for the Banking Respondents to file a responsive pleading. P.A. V.

curium opinion. P.A. XI. On August 6, 1993, the Eighth Circuit denied Goins' petition for rehearing. P.A. XII. On November 4, 1993, Goins filed this petition for certiorari.

III.

SUMMARY OF THE ARGUMENT

Goins' petition for a writ of certiorari should be denied. Goins argues that because the District Court had subject matter jurisdiction over the case, an answer was required in the District Court even after the case had been removed to the Bankruptcy Court; therefore, the Banking Respondents' motion to dismiss timely filed in the Bankruptcy Court (after removal and before remand) was a nullity, and the failure to file timely in the District Court entitled Goins to default judgment.

Goins' argument is patently frivolous. Once the notice of removal was filed, the Bankruptcy Court acquired jurisdiction over the case and the Banking Respondents were required to file an answer there. The fact that the Bankruptcy Court subsequently remanded the case for lack of subject matter jurisdiction is of no moment. It had jurisdiction over the case at the time the answer was due. Moreover, the case was properly before the Bankruptcy Court pursuant to the court's rule ordering automatic reference of bankruptcy matters. Thus, even if the removal were somehow insufficient to confer jurisdiction on the Bankruptcy Court, there is an alternative basis for the decision below. The District Court plainly did not abuse its discretion in accepting the Banking Respondents' motion to dismiss.

None of the purported issues Goins raises warrants certiorari. There is no conflict in the circuits on question presented. There also is no federal question implicated here relating to the "post-Marathon environment" or the propriety of the removal, because the Bankruptcy Court granted Goins' motion and remanded the case to the court where he originally had filed. Finally, there is no need for this Court to exercise its supervisory function to "order the correction of the district court docket" to reflect the proper filing of Goins' application for default, because (1) there was no error below; (2) Goins failed to raise the issue properly below or in this Court; and (3) any alleged error was harmless.

IV.

REASONS WHY THE WRIT SHOULD BE DENIED

A. The District Court Properly Denied Default Judgment Because The Banking Respondents Timely Filed A Motion To Dismiss In The Court Where The Case Was Pending When The Motion Was Due.

Goins' attempt to transform the District Court's denial of default judgment into an error of constitutional proportion is nonsense. At the time the Banking Respondents were required to answer the complaint or present their defenses, the case had been removed to the Bankruptcy Court. The Bankruptcy Court acquired jurisdiction over the case on March 20, 1992, the date a copy of the Notice of Removal was filed in the District Court. Fed. R. Bank. P. 9027(c). Because the Banking Respondents' answer was not due until April 6, 1992, they were required to answer or present defenses in the

Bankruptcy Court, where the case was then pending. Fed. R. Bank. P. 9027(g). They did so in a timely manner on April 6, 1992, filing a motion to dismiss pursuant to Fed. R. Bank. P. 7012(b).

Goins' convoluted argument appears to be that the District Court retained active jurisdiction over the case notwithstanding the removal, and the Bankruptcy Court never acquired jurisdiction; therefore, the answer was due in the District Court. This is wrong. It is long settled that, once removal becomes effective, the court from which the case is removed loses jurisdiction over the case unless and until the case is remanded. See National Steamship Co. v. Tugman, 106 U.S. 118, 122 (1882) (state court proceedings after removal are coram non judice and will be vacated); French v. Hay, 22 Wall. (89 U.S.) 250, 252-53 (1875) (federal court acquires exclusive

jurisdiction over case after removal from state court). Removal became effective in this case when a copy of the Notice of Removal was filed in the District Court. Fed. R. Bank. P. 9027(c). Indeed, the Federal Bankruptcy Rules command that, at that point, "[t]he parties shall proceed no further in that court unless and until the claim or cause of action is remanded." Id. Thus, the District Court lost active jurisdiction over the case and properly would have rejected any attempt to file an answer there before the Bankruptcy Court had ruled on its jurisdiction and ordered a remand.[5/]

5/ Indeed, the District Court twice denied motions filed there on the ground that the case was pending in the Bankruptcy Court. On May 6, 1992, the District Court affirmed a magistrate's ruling that denied Goins' motion to strike all pleadings referring to or bearing the caption of the bankruptcy matter, because the case had been removed. P.A. IV. And on May 26, 1992, the District Court denied Goins' motion for default judgment on the same ground. P.A. VI.

Goins argues that the removal should have been disregarded as a nullity, and the answer should have been filed in the District Court. This is incorrect. The Bankruptcy Court's jurisdiction over the case was not defeated by the fact that removal later was found to have been improper. It is fundamental that "[a] federal court has jurisdiction to determine its jurisdiction," Sierra Club v. Yeutter, 911 F.2d 1405, 1421 (10th Cir. 1990); Restatement (Second) of Judgments § 11 cmt. c (1982), and the parties before the court are bound to follow its rules and orders pending its jurisdictional ruling. United States v. United Mine Workers of America, 330 U.S. 258, 290-93 (1947) (pending decision on "doubtful question of jurisdiction," court has power to maintain status quo, including contempt power); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376-77

(1940) (even district court sitting in bankruptcy pursuant to statute later held unconstitutional has authority to determine its jurisdiction); Atlantic City Mun. Utils. Auth. v. Regional Administrator, 803 F.2d 96, 103 (3d Cir. 1986) ("While the district court and this court have been found to lack subject matter jurisdiction over the case, courts have jurisdiction in every case to determine their own jurisdiction."). Thus, while the Bankruptcy Court had jurisdiction, albeit briefly, to determine whether it had subject matter jurisdiction, the Banking Respondents were required to follow its rules and file their defenses there.

Even if the removal here were a nullity, and therefore insufficient to confer jurisdiction on the Bankruptcy Court, the decision below still was proper. The District Court twice ruled that "this

action is properly before the bankruptcy court pursuant to either the automatic reference provisions of Local Rule 201, as authorized by 28 U.S.C. 157(a) & 1334, or the filing of defendants' notice of removal under Bankr. R. 9027 . . . ." P.A. IV, at 3-4; P.A. VI, at 2-3. Thus, even if the removal were void, the case was properly before the Bankruptcy Court pursuant to an automatic reference from the District Court under Local Rule 201 when the Bankruptcy Respondents' answer was due. Goins' failure to challenge the automatic reference below or in this Court requires denial of his petition.

Goins also argues it was error to allow the Banking Respondents to refile their motion to dismiss in the District Court because it allowed them to avoid the need to appeal the Bankruptcy Court's denial of their motion to dismiss. This argument misses the

point. There was no "need" to appeal the Bankruptcy Court's ruling, because it was based on its lack of subject matter jurisdiction. It is well settled that a dismissal for lack of jurisdiction is not a ruling on the merits and is res judicata only with respect to the jurisdictional issue adjudicated.[6/] Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990) ("The res judicata effect of a 12(b)(1) motion [to dismiss for lack of subject matter jurisdiction] is . . . limited to the jurisdictional issue."); Voisin's Oyster House, Inc. v. Guidry, 799 F.2d 183, 188 (5th Cir. 1986) (court's dismissal for lack of jurisdiction is res judicata only as to the court's power and

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6/ Even if the Bankruptcy Court had ruled on substantive issues, its ruling that it lacked jurisdiction would have rendered any ruling on substantive issues a nullity. Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1279 (7th Cir. 1983); Burbridge Foundation, Inc. v. Reinholdt & Gardner, 496 F.2d 326, 328 (8th Cir. 1974).

"otherwise without prejudice to the plaintiff's claims"); 18 Wright & Miller, Federal Practice and Procedure, Jurisdiction § 4436 (1981).

Goins' arguments boil down to the proposition that the District Court abused its discretion in accepting the Banking Respondents' motion to dismiss. Even assuming everything Goins alleges is correct -- that the motion to dismiss was filed in the "wrong" court and was refiled late in the proper court[7/] -- the District Court still had discretion to accept it and to refuse to enter a default judgment. See Mendez v. Banco Popular de Puerto Rico, 900 F.2d 4, 6-7 (1st Cir. 1990) (district court has

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7/ Goins asserted below that removal from a district court to a bankruptcy court is improper because the latter is merely a "unit" of the former. At most then, Goins can assert that the Banking Respondents filed their motion to dismiss in the wrong unit of the proper court. Plainly, the District Court had discretion to accept the earlier filing that had been made in its bankruptcy unit.

considerable discretion in enlarging filing deadlines); Woods v. Allied Concord Financial Corp., 373 F.2d 733, 734 (5th Cir. 1967); Fed. R. Civ. P. 6(b). Goins did not attempt in the Eighth Circuit or in this Court to show that that discretion was abused, because it was not.[8/]

B. The Judgment Below Does Not Implicate Any Significant Federal Issue Or Require Exercise Of The Court's Supervisory Function.

Even assuming the issues Goins raises were serious, they are inappropriate for review on certiorari in this case. See Sup. Ct. R. 10.1. Goins does not argue that the decision below involves any

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8/ The refiling, even if considered late, was justified. The Bankruptcy Respondents timely filed in the court exercising jurisdiction -- even the District Court ruled that the Bankruptcy Court had jurisdiction at that time -- and refiled in the District Court immediately upon the Bankruptcy Court's jurisdictional ruling. There was no suggestion of bad faith and no prejudice to Goins.

conflict amongst the circuits or with a decision of this Court. He argues only that this Court should review the judgment below (1) because it implicates issues relating to the decision in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); and (2) to assure the integrity of the judicial proceedings below by ordering the correction of the District Court docket to reflect the filing of Goins' application for default. Each of these arguments is frivolous.

(1) The decision in Northern Pipeline Construction Co., that the Bankruptcy Act of 1978 impermissibly granted Article III jurisdiction to Article I bankruptcy judges, is not implicated here for two reasons. First, the Bankruptcy Court agreed with Goins that it lacked subject matter jurisdiction and remanded to the District Court on that ground.

Thus, there simply was no controversy below regarding the propriety of removal from the District Court to the Bankruptcy Court.

Second, Local Rule 201, the automatic reference provision, supplied an alternative basis for the Bankruptcy Court's jurisdiction until it ruled otherwise. Therefore, neither the "constitutional pitfalls of Marathon," nor related problems Goins believes may be "lurking in the new statutory jurisdictional scheme of 28 U.S.C. 157, 1334, and 1452" are implicated in this case. Goins' invitation to this Court to settle the issue of "the removability [to the bankruptcy court] of cases originally filed in the district courts," Cert. Pet. at 53-54, should be declined. Cert. Pet. at 52-53.

(2) There is also no reason to grant the petition to assure the integrity of the judicial proceedings

below.[9/] See Sup. Ct. R. 10.1(a). First, as explained above, the proceedings below were proper. Whether the transfer of the case to the Bankruptcy Court was proper as a removal or an automatic reference, it was not error for the District Court to allow the Bankruptcy Court to rule on its subject matter jurisdiction, at which point the case was returned to the District Court. Whatever the transfer is labeled, there is no dispute that the case was considered on the merits by the proper court.

Second, the question of whether the District Court docket is correct was not properly raised or

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9/ Goins argues he was denied due process because he was denied a default judgment to which he was entitled. He claims the Banking Respondents were able to "avoid" filing a timely response in the District Court, and to "avoid" a default judgment and the need to seek to vacate a default judgment. Cert. Pet. at 48-49. All this "because of the failure or refusal of the district court clerk to record the default proceedings." Cert. Pet. at 50.

decided in the Eighth Circuit and, therefore, is not properly before this Court. Notwithstanding Goins' argument that he raised the issue orally in the Eighth Circuit, there is nothing in the record to indicate what the District Court's docket contains or omits or whether such an omission had any consequence. There is no evidence of record that the docket below was erroneous.

Third, any alleged error below was harmless, because it had no impact on the outcome of the case.[10/] Goins claims the Banking Respondents should have been required to suffer entry of default judgment and then move to vacate such an order. He acknowledges the Banking Respondents would have

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10/ In addition, regardless of whether the docket accurately reflected the application for default, the District Court in fact considered Goins' application for default judgment and rejected it. Therefore, there is no need to "correct" the record below.

had the opportunity to move to set aside the default by showing good cause for failing to file in the District Court. Goins does not argue that good cause was lacking,[11/] only that it was error not to require a hearing.

Fourth, Local Rule 201, the automatic reference provision, provides an alternative basis for the decisions below, which Goins did not raise in the Eighth Circuit or in this Court.

Finally, if the alleged error had any effect at all, it effected only the litigants in this one case. There is no public interest involved. The issues Goins raises are at best "academic" and "episodic," and, therefore,

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11/ The record plainly reflects good cause: the Banking Respondents had timely filed in the Bankruptcy Court and immediately refiled in the District Court as soon as the Bankruptcy Court ruled it lacked subject matter jurisdiction. There is no suggestion of bad faith by the Banking Respondents or prejudice to Goins.

they do not justify a grant of certiorari. Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955).

V.

CONCLUSION

Goins' petition presents no issue for which a writ of certiorari should issue. The Banking Respondents properly and timely filed a motion to dismiss in the Bankruptcy Court, where the action was pending when the motion was due. Therefore, Goins was not entitled to default judgment. Goins cites no conflict in the circuits on the issues he raises. There is no federal issue in this case relating to the "post-Marathon environment" or whether removal here was proper, because the Bankruptcy Court granted Goins' motion and returned the case to the proper court. Finally, this Court need not exercise its supervisory function to "order the correction of the district court

docket" because (1) there was no error; (2) the issue was not properly raised; (3) any error was harmless; and (4) the issue is at best episodic, having no significance beyond this case.

There is a complete lack of merit in Goins' petition. For this reason, the Banking Respondents request, pursuant to Rule 42.2 of the Supreme Court Rules, an award of double costs and attorneys' fees in opposing the petition.

WHEREFORE, the Banking Respondents respectfully request that this Court deny Goins' petition for a writ of certiorari and award to the Banking Respondents double their costs and attorneys' fees.

Respectfully submitted,

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